

APPENDIX

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NOT RECOMMENDED FOR PUBLICATION

No. 20-5158

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

CHARLES EASON,

Defendant-Appellant.

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FILED
Sep 17, 2020
DEBORAH S. HUNT, Clerk

ON APPEAL FROM THE UNITED
STATES DISTRICT COURT FOR
THE WESTERN DISTRICT OF
TENNESSEE

ORDER

Before: STRANCH, THAPAR, and READLER, Circuit Judges.

Charles Eason appeals the 180-month sentence imposed by the district court following a remand for resentencing. His counsel has filed a motion to withdraw pursuant to *Anders v. California*, 386 U.S. 738 (1967). This case has been referred to a panel of the court that, upon examination, unanimously agrees that oral argument is not needed. *See* Fed. R. App. P. 34(a).

Without a written plea agreement, Eason pleaded guilty to one count of being a felon in possession of a firearm, in violation of 18 U.S.C. § 922(g). Pursuant to USSG § 2K2.1(a)(4)(A), the presentence report assigned a base offense level of 20 because Eason committed the offense subsequent to a prior conviction for a controlled substance offense. Under Chapter 4 of the Sentencing Guidelines, however, the presentence report deemed Eason an armed career criminal due to his prior convictions for a serious drug offense and assigned an enhanced offense level of 33. *See* USSG § 4B1.4(b)(3)(B). The report found that Eason's five prior convictions in Tennessee for promotion of methamphetamine manufacture qualified as serious drug offenses. After a three-level reduction for acceptance of responsibility, the total offense level was 30. That

total offense level and Eason's criminal history category of IV resulted in a guidelines imprisonment range of 135 to 168 months. However, because the statutory mandatory minimum sentence was 15 years under the Armed Career Criminal Act ("ACCA"), *see* 18 U.S.C. § 924(e)(1), the applicable guidelines range became 180 months. *See* USSG § 5G1.1(b).

Eason objected to his classification as an armed career criminal, arguing that his prior convictions for promotion of methamphetamine manufacture did not satisfy the statute's definition of a serious drug offense. Specifically, Eason argued that his convictions under section 39-17-433(a)(1) of the Tennessee Annotated Code were for "purchas[ing] . . . any . . . ingredient . . . that can be used to produce methamphetamine . . . with reckless disregard of its intended use" and that such conduct is "sufficiently remote to 'manufacturing' or 'distributing' to resist the definition of 'serious drug offense' under the ACCA." In addition, Eason asserted that the government was required to meet its burden to prove, "with competent documents," that his prior offenses were committed on separate occasions and that his prior convictions entailed a maximum term of imprisonment of ten years or more. At the sentencing hearing, the government introduced into evidence copies of the judgments for Eason's five prior convictions. Eason did not pursue the separate-occasions argument at the hearing, and his attorney seemed to concede that the government had met its burden. Instead, Eason focused on his argument that his prior convictions were not for serious drug offenses because his conduct did not involve manufacturing. The district court agreed with this argument, finding that purchasing an ingredient with reckless disregard for its intended use does not "relate[] closely enough or connect[] closely enough to the manufacturing that qualifies as a serious drug offense under the ACCA." Without the ACCA enhancement, the applicable guidelines range became 37 to 46 months. The court sentenced Eason to 46 months' imprisonment to be followed by three years of supervised release.

The government appealed the district court's ruling on the ACCA enhancement. We found that "[p]urchasing ingredients needed to make methamphetamine, and *consciously disregarding an unjustifiable risk* regarding how those products will be used, 'indirectly,' if not 'directly,' connects with methamphetamine's 'production, preparation, propagation, compounding or

processing” and therefore concluded that Eason’s prior convictions qualified as serious drug offenses under the ACCA. *United States v. Eason*, 919 F.3d 385, 392 (6th Cir. 2019) (quoting 21 U.S.C. § 802(15)). Eason argued that, given the statutory ambiguity, the rule of lenity should be applied to prohibit application of the ACCA. But we rejected that argument, explaining that “the categorical approach provide[d] the process, and the ACCA’s definitions provide[d] the substance by which the court [could] readily determine if Eason’s convictions [were] predicate offenses . . .” *Id.* We reversed the sentence and remanded the matter to the district court for resentencing. *Id.* at 392-93.

On remand, Eason reiterated his objection that the government failed to prove that his five prior convictions for promotion of methamphetamine manufacture were “committed on occasions different from one another,” as required by 18 U.S.C. § 924(e)(1). The district court noted that Eason’s argument was likely waived by his failure to raise the issue on appeal. But the court ultimately examined the merits of the issue and concluded that the offenses were committed on separate occasions. Finding that Eason was an armed career criminal, the court imposed the mandatory minimum sentence of 180 months’ imprisonment.

Eason’s attorney has now filed a brief and a motion to withdraw pursuant to *Anders*, stating that he has examined the record and found no non-frivolous grounds to raise on appeal. Nonetheless, counsel has resubmitted for this court’s consideration the issue of whether the rule of lenity should have applied to uphold the district court’s initial determination that Eason was not an armed career criminal given the “statutory ambiguity [that] persisted into the remand for resentencing . . .” Counsel ultimately concludes, however, that there is no non-frivolous issue for appeal. Eason has filed a pro se brief in response, arguing that the district court improperly determined that his prior convictions occurred on separate occasions, that the court improperly declined to hold an evidentiary hearing to allow him to present evidence to show that the prior convictions were part of one continuous offense, and that counsel was ineffective for failing to request an evidentiary hearing and by failing to raise the separate-occasions argument on appeal.

Counsel has filed an adequate *Anders* brief and properly concludes that there are no issues present on the record that would support an appeal. *See Anders*, 386 U.S. at 744.

First, although counsel reargues the merits of whether Eason's prior convictions for promoting methamphetamine manufacture in Tennessee qualify as serious drug offenses under the ACCA, the law-of-the-case doctrine precludes Eason from pursuing that claim in this appeal. "Under the doctrine of law of the case, findings made at one point in the litigation become the law of the case for subsequent stages of that same litigation." *United States v. Moored*, 38 F.3d 1419, 1421 (6th Cir. 1994). We have already ruled that Eason's prior convictions are serious drug offenses under the ACCA. That prior ruling is binding on this court. *See United States v. Haynes*, 468 F.3d 422, 426 (6th Cir. 2006).

Second, although counsel does not address this issue in his *Anders* brief, Eason seeks to challenge his classification as an armed career criminal on the ground that the government failed to meet its burden of proving that his prior promotion convictions occurred on separate occasions. In the district court, the government argued that Eason was precluded from raising this issue because he conceded the point at the initial sentencing hearing and he failed to raise the issue on appeal to this court. The government also argued that this court impliedly ruled on the issue in the previous appeal and that the issue therefore was beyond the scope of the court's limited remand. Even if there is room for Eason to argue that our remand was not so limited and that the district court was free to consider the separate-occasions argument on remand, Eason's challenge to the district court's ultimate ruling that the convictions occurred on separate occasions lacks arguable merit.

We review de novo a district court's determination that prior offenses were committed on occasions different from one another. *United States v. Pham*, 872 F.3d 799, 801 (6th Cir. 2017). The government bears the burden of proving this by a preponderance of the evidence and, in doing so, must use "*Shepard* documents," *id.*, which include "the terms of the charging document, the terms of a plea agreement or transcript of colloquy between judge and defendant in which the factual basis for the plea was confirmed by the defendant, or . . . some comparable judicial record

of this information,” *Shepard v. United States*, 544 U.S. 13, 26 (2005); *United States v. King*, 853 F.3d 267, 271 (6th Cir. 2017).

Offenses will be found to have been committed on different occasions under the ACCA if (1) “it is possible to discern the point at which the first offense is completed, and the subsequent point at which the second offense begins”; (2) “it would have been possible for the offender to cease his criminal conduct after the first offense, and withdraw without committing the second offense”; or (3) “the offenses are committed in different residences or business locations.” *United States v. Hill*, 440 F.3d 292, 297-98 (6th Cir. 2006). “Offenses are separate if they meet *any* of these three tests.” *United States v. Southers*, 866 F.3d 364, 369 (6th Cir. 2017) (quoting *United States v. Jones*, 673 F.3d 497, 503 (6th Cir. 2012)).

Each of the five indictments charging Eason with promotion of methamphetamine manufacture set forth distinct time periods—October 8, 2008, to November 5, 2008; November 12, 2008, to November 24, 2008; December 20, 2008, to January 19, 2009; January 22, 2009, to February 22, 2009; and March 3, 2009, to March 26, 2009. And each judgment referenced the corresponding indictment and set forth different offense dates. The government also submitted the transcript of the plea hearing, which reflects Eason’s admission to the facts as set forth in each indictment. Eason now contends that the district court should have conducted an evidentiary hearing on the issue. But a hearing was not necessary because the government submitted sufficient proof that the offenses were separate. Because the indictments, judgment, and the plea hearing transcript establish that each offense occurred during distinct time periods separated by at least a few days, the district court did not err in finding that the government met its burden of proving that the offenses occurred on separate occasions under both the first and second tests set forth in *Hill*. See *United States v. McClurg*, 811 F. App’x 945, 949 (6th Cir. 2020). The district court therefore properly sentenced Eason as an armed career criminal.

Eason’s 180-month ACCA sentence is both substantively and procedurally reasonable because it is the minimum sentence set by statute. Both district courts imposing sentence and appellate courts reviewing them are bound by minimum sentences set by statute, and consideration

of the substantive and procedural reasonableness of such sentences is not appropriate. *United States v. Higgins*, 557 F.3d 381, 397-98 (6th Cir. 2009); *see also United States v. Graham*, 622 F.3d 445, 464 (6th Cir. 2010); *United States v. Smith*, 419 F.3d 521, 532 (6th Cir. 2005). In *Higgins*, we explained that when a defendant has properly been sentenced to a statutory mandatory minimum, no remand is warranted for unreasonableness because, even if the court found that the sentence was unreasonable, “the statutory mandatory minimum would continue to bind the district court.” 557 F.3d at 398. Eason has no basis for challenging the reasonableness of his sentence.

Finally, there are no viable ineffective-assistance-of-counsel or prosecutorial-misconduct claims for appeal that are apparent on this record. And, in any event, claims based on information outside the record, such as Eason’s proposed claim that counsel was ineffective for failing to request an evidentiary hearing on the separate-occasions issue and for failing to raise an effective challenge to application of the ACCA, are generally disfavored on direct appeal and are more appropriately raised in a 28 U.S.C. § 2255 motion to vacate, set aside, or correct sentence. *See Massaro v. United States*, 538 U.S. 500, 504-05 (2003); *United States v. Walden*, 625 F.3d 961, 967 (6th Cir. 2010).

Independent review of the record confirms that there are no issues of arguable merit for appeal. Accordingly, we **GRANT** counsel’s motion to withdraw, and **AFFIRM** the district court’s judgment.

ENTERED BY ORDER OF THE COURT



Deborah S. Hunt, Clerk